



**KCB Bank Kenya Limited v Karigi t/a Mugendi Karigi & Co Advocates & another
(Civil Appeal E038 of 2023) [2023] KEHC 23858 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E038 OF 2023
LM NJUGUNA, J
OCTOBER 17, 2023**

BETWEEN

KCB BANK KENYA LIMITED APPELLANT

AND

**MORRIS MUGENDI KARIGI T/A MUGENDI KARIGI & CO
ADVOCATES 1ST RESPONDENT**

AFRICAN MERCHANT ASSURANCE CO.LTD 2ND RESPONDENT

RULING

1. The appellant/applicant filed notice of motion dated 26th July 2023 premised on the grounds set out on its face and in the supporting affidavit, seeking orders that:
 - a. Spent;
 - b. The honourable court be pleased to grant an order for stay of execution of order absolute given on 18th July 2023 in Embu CMCC no. E075 of 2020 Morris Mugendi Karigi Vs. Africa Merchant Assurance Co. Ltd & Kenya Commercial Bank Ltd (1st Garnishee) and all consequential orders pending hearing and determination of this application;
 - c. The honourable court be pleased to grant an order for stay of execution of order absolute given on 18th July 2023 in Embu CMCC no. E075 of 2020 *Morris Mugendi Karigi v. Africa Merchant Assurance Co. Ltd & Kenya Commercial Bank Ltd* (1st Garnishee) and all consequential orders pending hearing and determination of this appeal; and
 - d. Costs of this application be provided for.
2. In response, the 1st respondent stated that the application is unmerited and bad in law as it served to delay the court process. That the applicant has not demonstrated sufficient cause for the court to grant stay of execution. That the applicant misconstrued stay of execution of garnishee orders as against



stay of proceedings sought through application dated 18th July 2023. That the garnishee absolute was issued following evidence that the applicant was holding money meant to satisfy the order nisi, and that the order absolute takes precedence over the order nisi. That the applicant and 2nd respondents are working together to deny the 1st respondent his right to execute the garnishee order absolute. That he is aware that money has been removed from the same account which the applicant claims is locked. He averred that the applicant has not demonstrated what prejudice they are likely to suffer if the orders are not granted and urged the court to dismiss the application. Through a supplementary affidavit, he produced proof that money was withdrawn from the allegedly locked account and credited in court as decretal sum for another case.

3. The applicant filed a further supporting affidavit stating that it is presumptuous for the 1st respondent to say that the order absolute takes precedence over the order nisi. That the order nisi was not vacated in order to enable the applicant unlock the funds. That the advocate in whose favour the money was paid out as alluded in the 1st respondent's supplementary affidavit is a stranger to the case and that the advocate known to the applicant in that case is M/S Mberia Advocates. That the 1st respondent has not stated who moved the money and that the court should treat the averments as hearsay.
4. The background of the case is that the court issued a garnishee order against the applicant for the sum of Ksh. 1,654,563.77 and ordered that the same be released to the 1st respondent in partial satisfaction of the decretal sum. That the amount has been locked to meet the amount in the previous order nisi served upon the applicant. The applicant has sought an appeal against the said absolute orders stating that the appeal has high chances of success. That the only amount due and recoverable by the 2nd respondent is Kshs. 1,090.16. That if the orders sought are not granted, the applicant is bound to suffer loss as an innocent party.
5. The application was canvassed by way of written submissions. The appellant and 1st respondent filed their written submissions.
6. The applicant in its submissions relied on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* on the guiding principles for granting orders of stay of execution pending appeal. They submitted that the order nisi was for the amount of Kshs. 1,653,473.61 and the order absolute was for Kshs. 1,654,563.77 and that the net amount payable on the second order absolute was Kshs. 1,090.16 as the rest of the amount has been locked in the account following the order nisi. They reminded the court that garnishee proceedings are never meant to be punitive to the garnishee but only to facilitate payment of the amounts held by the garnishee on behalf of the judgment-debtor.
7. It was their argument that the decretal amount available was Kshs. 1,090.16 to be settled in partial satisfaction of the order absolute. That if the decretal sum is paid to the 1st respondent, the intended appeal would be rendered nugatory as the order absolute will have been satisfied. That the role of the applicant as garnishee was to confirm whether or not the 2nd respondent's account had money, which they did and therefore the 1st respondent cannot recover the decretal amount through the garnishee's assets.
8. That the 1st respondent being a practicing advocate has not declared any known assets and so if the money is paid out to him, he may not be able to return it should the appeal succeed. It was their case that in as much as the 1st respondent is entitled to enjoy the fruits of his appeal, it is also the right of the applicant to the appeal. They relied on the cases of *Kinyanjui Njuguna & Co. Advocates Vs. Diamond Trust bank Kenya Limited & Another (Garnishee)* (2019) eKLR and *Kenindia Assurance Co Ltd Vs Patric Muturi* (1994) eKLR.



9. The 1st respondent submitted that per Order 42 Rule 6, the applicant has surely filed the application without delay but has failed to give or offer security for specific performance and that the application should be dismissed. He relied on the case of *Ngaywa Ngigi & Kibet Advocates v. Invesco Assurance Co. Ltd; Diamond Trust bank (Garnishee)* (2020) eKLR where the purpose of garnishee proceedings was explained. It was his case that the substance of the appeal is whether the garnishee orders absolute issued in Embu CMCC no. E075 of 2020 takes precedence over orders from any other courts. He relied on the case of *Martin Mwangi Ndirangu Vs. Invesco Assurance Co. Ltd* (2020) eKLR where the court held that order absolute takes precedence over order nisi. Reliance was also placed on the case of *James Wangalwa Vs. Agnes Naliaka Cheseto* (2012) eKLR. The 1st respondent urged the court to dismiss the application or in the alternative order that security be deposited in court and the hearing of the appeal be expedited.
10. From the foregoing, I am faced with the question of whether stay of execution of the decree should be granted in the pendency of hearing and determination of the appeal.
11. An application for stay pending appeal is governed by Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) which provides as follows:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless –
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
12. There are only three factors to consider before granting orders for stay, as expressly stated under subrule (2) above. The first one is whether there has been delay in bringing the application for stay. The impugned orders were granted on 24th July 2023 while the application for stay of execution was filed on 27th July 2023. The applicant was prompt in filing the application, thereby satisfying the requirement. Moreover, the 1st respondent concedes that the application was indeed filed promptly.
13. On the second issue of security, the applicant has neither expressed commitment to deposit security for specific performance, neither has it addressed the requirement in its submissions. The applicant merely states that they are bound to suffer loss if the orders are not granted and that if the amount is paid to the 1st respondent and the appeal succeed, that they may not be able to recover the money. Security for specific performance is an important factor to be considered before granting orders for



stay of execution pending appeal. I am also not convinced that the applicant has demonstrated that they are bound to suffer irreparable loss if the orders for stay are not granted.

14. Seeing as the grant of stay pending appeal is discretionary, I shall consider the elements as stated under Order 42 Rule 6(2) of the Civil Procedure Rules. In the case of *Ena Investment Limited Vs Benard Ochau Mose & 2 others* (2022) eKLR the court cited with authority the case of *Absalom Dova Vs. Tarbo Transporters* (2013) eKLR, where it was held: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

The court added:

“As already demonstrated in *James Wangalwa & Another Vs. Agnes Naliaka Cheseto (supra)* the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicants herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer and they failed to furnish security as stipulated by sub-rule 2b.

15. Eventually, the role of the court is to administer justice. This can only be achieved when the court considers the arguments of both parties, weighing the pros and cons of the discretionary decision of the court to either side of the litigation divide. That is, the losses bound to be suffered by the applicant as against the gains to the respondents and vice versa if the orders sought are either granted or denied. The court, in *RWW Vs. EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. I have perused the memorandum of appeal and in my view, the same deserves to see the light of day. Therefore, in the spirit of Article 159 of *the Constitution* and the overriding objective as enshrined in sections 1A, 1B and 3A of the *Civil Procedure Act*, I shall allow the application for stay pending appeal on the following conditions:

- a. Stay of execution of the order issued on 18th July 2023 is hereby granted pending hearing and determination of the appeal;
- b. The record of appeal be filed and served within 14 days of this ruling;



- c. The Applicant deposit Ksh. 1,654,563.77 to the court account within 7 days of this ruling failing which the appeal shall stand dismissed;
- d. The appeal to be prosecuted within 90 days from the date of filing the record of appeal; and
- e. The costs of this application shall abide in the outcome of the appeal.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

